

1 [NOTE: Each PPA request is evaluated on its own merits. The
2 full text of recent prospective purchaser agreements is provided
3 for information purposes only. The Model Prospective Purchaser
4 Agreement will serve as a starting point for structuring future
5 agreements.]

6 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
7 REGION III

8 IN THE MATTER OF: :
9 :
10 Metro Container Corporation Site :
11 : EPA Docket No. CERC-PPA-99-06
12 :
13 Trainer Industries, LLC, :
14 :
15 Settling Respondent :
16 :
17 :
18 Under Authority of the Comprehensive :
19 Environmental Response, Compensation, :
20 and Liability Act of 1980, as amended, :
21 42 U.S.C. § 9601, et seq. :
22 :

23 AGREEMENT AND COVENANT
24 NOT TO SUE

25 I. INTRODUCTION

26 This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and
27 between the United States on behalf of the U.S. Environmental Protection Agency ("EPA") and
28 Trainer Industries, LLC (collectively the "Parties").

29 This Agreement is entered into pursuant to the Comprehensive Environmental Response,
30 Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq.
31 and the authority of the Attorney General of the United States to compromise and settle claims of

1 the United States.

2 Settling Respondent Trainer Industries, LLC is a Pennsylvania limited liability company
3 formed for the purpose of acquiring the Property, as defined below. The Metro Container
4 Corporation Site (“Site”) is located at West Second Street and Price Road in Trainer Borough,
5 Delaware County, Pennsylvania. The Site is currently owned by Metro Container Corporation
6 (“Metro”) in trust for the benefit of creditors and interest holders of the bankruptcy estate of
7 Metro in accordance with a plan approved by the United States Bankruptcy Court for the District
8 of Delaware in September 1988. Settling Respondent intends to construct an office building and
9 warehouse for operations and storage of equipment, paints, and paint-related materials. Thinners
10 and solvents will be stored in a separate location within the warehouse space in an area designed
11 with secondary containment. Diesel fuel to operate compressors will be stored outside the
12 warehouse in a 500-gallon above-ground storage tank in an area designed with secondary
13 containment. The warehouse will contain separate areas designated as abrasive blast and paint
14 shops.

15 The Parties agree to undertake all actions required by the terms and conditions of this
16 Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and
17 limitations contained in Sections VII, VIII, IX, and X the potential liability of the Settling
18 Respondent for the Existing Contamination at the Property which would otherwise result from
19 Settling Respondent becoming the owner of the Property.

20 The Parties agree that the Settling Respondent's entry into this Agreement, and the actions
21 undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an

admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. "Parties" shall mean EPA and the Settling Respondent.

4. "Property" shall mean that portion of the Site which is described in Exhibit 1 of this Agreement.

5. "Settling Respondent" shall mean Trainer Industries, LLC.

6. "Site" shall mean the Metro Container Site located at and near the intersection of West Second Street and Price Road in Trainer Borough, Delaware County, Pennsylvania and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located.

7. "United States" shall mean the United States of America, its departments, agencies, and

instrumentalities.

III. STATEMENT OF FACTS

8. Between approximately 1920 and 1959, the Stauffer Chemical Company manufactured sulfuric acid and other chemicals at the Site. In 1963, the Joseph Reiss Company purchased the Site and erected and operated a steel drum recycling facility. Operations were taken over by the Universal Container Corporation, which eventually purchased the facility. In or around 1983, Universal Container Corporation changed ownership and its name to Metro Container Corporation. Drum recycling operations continued at the Site until approximately 1987. A Site Inspection by EPA in 1987 revealed an open cement lagoon nearly overflowing with waste sludges, numerous 55-gallon drums containing sludges, and approximately 60,000 unreclaimed drums. Metro Container Corporation filed a petition for bankruptcy in April 1988. A plan of reorganization through liquidation was approved by the Bankruptcy Court in September 1988. In 1989-1990, several responsible parties disposed of thousands of contaminated drums, sludges, liquids, and soils removed from the Site under EPA Administrative Order on Consent No. III-89-11-DC. In or around July 1990, EPA conducted further actions to remove and dispose of several contaminated drums unearthed during regrading operations. Under the approved liquidation plan, the Site remained the property of the debtor estate and continues up to the present to be property of the debtor estate. Wilmington Trust Company holds several mortgages on the Site property.

Settling Respondent intends to purchase these mortgages from Wilmington Trust Company and foreclose on such mortgages or procure a deed in lieu of foreclosure from Metro or from the bankruptcy estate to secure title to the Property. No proceeds of the sale will be paid to the current owner.

9. The Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the performance, by a contractor retained by Settling Respondent, of an Environmental Site Assessment which included, among other actions, a review of historical maps and photographs, file review at EPA and the Pennsylvania Department of Environmental Protection, collection and analysis of samples, and a ground penetrating radar survey.

IV. PAYMENT

10. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein, Settling Respondent agrees to pay to EPA the sum of \$15,000.00 within thirty (30) days of the effective date of this Agreement. The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to the "EPA Hazardous Substance Superfund." Each such check shall contain Settling Respondent's name and address and the following information:

"EPA Docket No. III-98-015-DC"
"Site/Spill ID# 03BQ"
"DOJ case number 90-11-2-979A"

Payment shall be forwarded to:

U.S. Environmental Protection Agency
Region III
Superfund Accounting
Box 360515
Pittsburgh, PA 15251-6515

Notice of payment and a copy of the check shall be sent to those persons listed in Section XV
(Notices and Submissions) and to the EPA Region III comptroller's office at the following
address:

Office of the Regional Comptroller(3PM30)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

and to the Docket Clerk at the following address:

Docket Clerk (3RC00)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

11. Amounts due and owing pursuant to the terms of this Agreement but not paid in
accordance with the terms of this Agreement shall accrue interest at the rate established pursuant
to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

V. ACCESS AND NOTICE TO SUCCESSORS IN INTEREST

12. Commencing upon the date that it acquires title to the Property, Settling Respondent
agrees to provide to EPA its authorized officers, employees, representatives, and all other persons

performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et. seq. ("RCRA"), and any other applicable statute or regulation, including any amendments thereto.

13. Settling Respondent agrees that:

(a) Within thirty (30) days after the effective date of this Agreement, the Settling Respondent shall record a notice of the existence of this Agreement with the Recorder's Office (or Registry of Deeds or other appropriate office), Delaware County, Pennsylvania. A copy of this Agreement shall be attached to such notice. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents shall be sent to the persons listed in Section XV (Notices and Submissions).

(b) The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or

1 sublessee on the Property as of the effective date of this Agreement and shall ensure that any
2 subsequent leases, subleases, assignments or transfers of the Property or an interest in the
3 Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant),
4 of the Agreement.

5 **VI. DUE CARE/COOPERATION**

6 14. The Settling Respondent shall exercise due care at the Site with respect to the
7 Existing Contamination and shall comply with all applicable local, State, and federal laws and
8 regulations. The Settling Respondent recognizes that the implementation of response actions at
9 the Site may interfere with the Settling Respondent's use of the Property, and may require closure
10 of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in
11 the implementation of response actions at the Site and further agrees not to interfere with such
12 response actions. EPA agrees, consistent with its responsibilities under applicable law, to use
13 reasonable efforts to minimize any interference with the Settling Respondent's operations by such
14 entry and response. In the event the Settling Respondent becomes aware of any action or
15 occurrence which causes or threatens a release of hazardous substances, pollutants or
16 contaminants at or from the Site that constitutes an emergency situation or may present an
17 immediate threat to public health or welfare or the environment, Settling Respondent shall
18 immediately take all appropriate action to prevent, abate, or minimize such release or threat of
19 release, and shall, in addition to complying with any applicable notification requirements under
20 Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such

1 release or threatened release.

2 **VII. CERTIFICATION**

3 15. By entering into this agreement, the Settling Respondent certifies that to the best of
4 its knowledge and belief it has fully and accurately disclosed to EPA all information known to
5 Settling Respondent and all information in the possession or control of its officers, directors,
6 employees, contractors, and agents which relates in any way to any Existing Contamination or any
7 past or potential future release of hazardous substances, pollutants or contaminants at or from the
8 Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the
9 best of its knowledge and belief it has not caused or contributed to a release or threat of release of
10 hazardous substances or pollutants or contaminants at the Site. If the United States determines
11 that information provided by Settling Respondent is not materially accurate and complete, the
12 Agreement, within the sole discretion of the United States, shall be null and void and the United
13 States reserves all rights it may have.

14 **VIII. UNITED STATES' COVENANT NOT TO SUE**

15 16. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment
16 of the amount specified in Section IV (Payment), the United States covenants not to sue or take
17 any other civil or administrative action against Settling Respondent for any and all civil liability for
18 injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of
19 CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with respect to the Existing Contamination.

1 **IX. RESERVATION OF RIGHTS**

2 17. The covenant not to sue set forth in Section VIII above does not pertain to any
3 matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue).
4 The United States reserves and the Agreement is without prejudice to all rights against Settling
5 Respondent with respect to all other matters, including but not limited to, the following:

6 (a) claims based on a failure by Settling Respondent to meet a requirement of this
7 Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to
8 Successors in Interest), Section VI (Due Care/Cooperation), and Section XIV (Payment of
9 Costs);

10 (b) any liability resulting from past or future releases of hazardous substances, pollutants
11 or contaminants, at or from the Site caused or contributed to by Settling Respondent, its
12 successors, assignees, lessees or sublessees;

13 (c) any liability resulting from exacerbation by Settling Respondent, its successors,
14 assignees, lessees or sublessees, of Existing Contamination;

15 (d) any liability resulting from the release or threat of release of hazardous substances,
16 pollutants or contaminants, at the Site after the effective date of this Agreement, not within the
17 definition of Existing Contamination;

18 (e) criminal liability;

19 (f) liability for damages for injury to, destruction of, or loss of natural resources, and for
20 the costs of any natural resource damage assessment incurred by federal agencies other than EPA;
21 and

1 (g) liability for violations of local, State, or federal law or regulations.

2 18. With respect to any claim or cause of action asserted by the United States, the
3 Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part
4 thereof, is attributable solely to Existing Contamination.

5 19. Nothing in this Agreement is intended as a release or covenant not to sue for any
6 claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in
7 equity, which the United States may have against any person, firm, corporation, or other entity
8 not a party to this Agreement.

9 20. Nothing in this Agreement is intended to limit the right of EPA to undertake future
10 response actions at the Site or to seek to compel parties other than the Settling Respondent to
11 perform or pay for response actions at the Site. Nothing in this Agreement shall in any way
12 restrict or limit the nature or scope of response actions which may be taken or be required by
13 EPA in exercising its authority under federal law. Settling Respondent acknowledges that it is
14 purchasing property where response actions may be required.

15 **X. SETTLING RESPONDENT'S COVENANT NOT TO SUE**

16 21. In consideration of the United States' Covenant Not To Sue in Section VIII of this
17 Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or
18 causes of action against the United States, its authorized officers, employees, or representatives
19 with respect to the Site or this Agreement, including but not limited to, any direct or indirect
20 claims for reimbursement from the Hazardous Substance Superfund established pursuant to the

1 Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113,
2 or any other provision of law, any claim against the United States, including any department,
3 agency or instrumentality of the United States under Sections 107 or 113 of CERCLA related to
4 the Site, or any claims arising out of response activities at the Site, including claims based on
5 EPA's oversight of such activities or approval of plans for such activities.

6 22. The Settling Respondent reserves, and this Agreement is without prejudice to, actions
7 against the United States based on negligent actions taken directly by the United States, not
8 including oversight or approval of the Settling Respondent's plans or activities, that are brought
9 pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign
10 immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to
11 constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C.
12 § 9611, or 40 C.F.R. § 300.700(d).

13 **XI. PARTIES BOUND/TRANSFER OF COVENANT**

14 23. This Agreement shall apply to and be binding upon the United States and shall apply
15 to and be binding on the Settling Respondent, its officers, directors, employees, and agents. The
16 undersigned representative of Settling Respondent certifies that he or she is fully authorized to
17 enter into the terms and conditions of this Agreement and to legally bind such Settling
18 Respondent.

19 24. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and
20 obligations conferred upon Settling Respondent under this Agreement may be assigned or

1 transferred to any person with the prior written consent of EPA in its sole discretion, which
2 consent will not be unreasonably withheld.

3 25. The Settling Respondent agrees to pay the reasonable costs incurred by EPA to
4 review any subsequent requests for consent to assign or transfer the benefits conferred by this
5 Agreement.

6 26. In the event of an assignment or transfer of the Property or an assignment or transfer
7 of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms
8 and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor
9 or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover,
10 prior to or simultaneous with any assignment or transfer of the Property, the assignee or
11 transferee must consent in writing to be bound by the terms of this Agreement including but not
12 limited to the certification requirement in Section VII of this Agreement in order for the Covenant
13 Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section
14 VIII shall not be effective with respect to any assignees or transferees who fail to provide such
15 written consent to EPA.

16 **XII. DISCLAIMER**

17 27. This Agreement in no way constitutes a finding by EPA as to the risks to human
18 health and the environment which may be posed by contamination at the Property or the Site nor
19 constitutes any representation by EPA that the Property or the Site is fit for any particular
20 purpose.

1 **XIII. DOCUMENT RETENTION**

2 28. The Settling Respondent agrees to retain and make available to EPA all business and
3 operating records, contracts, site studies and investigations, and documents relating to operations
4 at the Property for at least ten (10) years following the effective date of this Agreement unless
5 otherwise agreed to in writing by the Settling Respondent and EPA. At the end of ten years, the
6 Settling Respondent shall notify EPA of the location of such documents and shall provide EPA
7 with an opportunity to copy any documents at the expense of EPA.

8 **XIV. PAYMENT OF COSTS**

9 29. If the Settling Respondent fails to comply with the terms of this Agreement,
10 including, but not limited to, the provisions of Section IV (Payment) of this Agreement, it shall be
11 liable for all litigation and other enforcement costs incurred by the United States to enforce this
12 Agreement or otherwise obtain compliance.

13
14 **XV. NOTICES AND SUBMISSIONS**

15 30. All notices and submissions provided pursuant to this Agreement shall be forwarded
16 to:

17 Cornelius Carr (3HS00)
18 U.S. Environmental Protection Agency
19 Region III
20 1650 Arch Street
21 Philadelphia, PA 19103

22 and

23 Andrew S. Goldman (3RC21)

U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

XVI. EFFECTIVE DATE

31. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that the public comment period has closed and the United States consents to the Agreement.

XVII. TERMINATION

32. If Settling Respondent or EPA believes that any or all of the obligations under Section V (Access and Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, such party may request in writing that the other party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XVIII. CONTRIBUTION PROTECTION

33. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or to be

1 taken and response costs incurred or to be incurred by the United States or any other person for
2 the Site with respect to the Existing Contamination.

3 34. The Settling Respondent agrees that with respect to any suit or claim for contribution
4 brought by it for matters related to this Agreement it will notify the United States in writing no
5 later than sixty (60) days prior to the initiation of such suit or claim.

6 35. The Settling Respondent also agrees that with respect to any suit or claim for
7 contribution brought against it for matters related to this Agreement it will notify in writing the
8 United States within ten (10) days of service of the complaint on it.

9
10 **XIX. EXHIBITS**

11 36. Exhibit 1 shall mean a deed of the Property which is the subject of this Agreement.

12 37. Exhibit 2 shall mean the map depicting the Site.

13
14 **XX. PUBLIC COMMENT**

15 38. This Agreement shall be subject to a thirty (30) day public comment period, after
16 which the United States may modify or withdraw its consent to this Agreement if comments
17 received disclose facts or considerations which indicate that this Agreement is inappropriate,
18 improper, or inadequate.

19 **IT IS SO AGREED.**

1 Environment and Natural Resources Division
2 U.S. Department of Justice

3 **FOR THE SETTLING RESPONDENT:**

4 _____
5 _____ Date

6 Name: _____

7 Position/Title: _____